PRE-EMPLOYMENT MEDICAL SCREENING AND THE LAW[1]

INTRODUCTION

The process and decisions resulting from the medical screening of patrol officer candidates are dictated as much by state and federal regulations as by accepted medical practices. It is therefore imperative that physicians as well as hiring authorities have a full and complete understanding of the legal issues underlying medical screening for occupational suitability.

When this legal section was first published in 1993, the federal Americans with Disabilities Act (ADA) was very new. Since that time, regulations and guidelines from the enforcement agency – the EEOC – as well as case law have shaped the ADA's influence on pre-employment medical screening and related personnel practices. However, the impact of the ADA has been in good part eclipsed by very recent changes to California disability statutes.

This chapter will distill both federal and state disability laws as they relate specifically to the conduct of pre-employment medical screening of entry level patrol officers in California. However, this information cannot and should not be considered legal advice; legal counsel should be consulted when specific compliance questions arise.

BACKGROUND

California law requires that all individuals empowered as patrol officers be evaluated by a licensed physician and surgeon to ensure that they are free from any physical condition which might adversely affect their exercise of these powers (2 Cal. Gov. Code 1031(f)). The POST requirements regarding the conduct of this examination are spelled out in POST Commission Regulation 1002(a)(7) and Commission Procedure C-2.

The interpretation and implementation of these requirements must be tempered by other state laws that protect the rights of those with medical conditions and physical handicaps. California has always been a very progressive state in this regard. Since 1975, the California Fair Employment and Housing Act (FEHA) has prohibited state employers of five or more from discriminating on the basis of physical handicap or medical condition.

FEHA was revised by the enactment of the Prudence Kay Poppink Act (PKP - formerly A.B. 2222) which became law on January 1, 2001. The PKP was in direct response to recent judicial decisions that restricted protection under the ADA. For example, in

---

[1]Author: Shelley Weiss Spilberg, Ph.D.

recent years federal courts have concluded that conditions such as cancer, epilepsy, and asthma, and virtually all correctable conditions are *not* disabilities. As stated by the law's author, California Senator Sheila Kuehl, the new "California disability law provides protections independent from the ADA . . . the ADA provides a floor of protection to Californians with disabilities, but not a ceiling."

When differences exist between state and federal law, the latter technically predominates. However, since the ADA does not prevent a state or local entity from affording even greater employment protection to the disabled, in reality, the law that provides the most protection will prevail – which, will be the California FEHA in virtually all cases.

WHO IS DISABLED

Both the ADA and FEHA afford employment protection only to those who are deemed disabled. As a result of the PKP, however, California provides much broader interpretation of what constitutes a disability, relative to the ADA.

Limits v. Substantially Limits. In California, a physical disability is defined as an impairment that *limits* a *major life activity*, which is defined as making the achievement of the activity difficult. The ADA, however, requires that the impairment *substantially* limit the major life activity before it is considered disabling. Both laws include those who have a "record or history" of a disability, as well as those who perceived (correctly or incorrectly) as being disabled.

Mitigating Measures. Another key difference between state and federal law is whether mitigating or corrective measures are to be considered when determining disability. As a result of three 1999 U.S. Supreme Court cases (Sutton v. United Air Lines, Inc.; Murphy v. United Parcel Service, Inc.; Albertson's, Inc. v. Kirkingburg, 1999), under the ADA, disabilities are to be defined after consideration of any mitigating or corrective measures, such as medications, assistive devices, prosthetics or reasonable accommodations (unless the mitigating measure itself limits an individual's ability to participate in major life activities). The new California FEHA, however, specifically states that individuals are to be considered in their unmitigated state when evaluating disability. The new FEHA also specifically covers a variety of medical conditions which, once mitigated, may not be considered disabilities under ADA, including (but not limited to) chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.

Working as a Major Life Activity. There are also significant differences between the ADA and the new FEHA in the interpretation of "major life activity." The list of included activities themselves is quite similar for both laws, and includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and *working*. However, according to the EEOC regulations interpreting the ADA, individuals cannot be "substantially limited in the major life activity

of working" unless they provide evidence that they are substantially limited in performing a *broad class or range of jobs*. This is in sharp contrast to the new FEHA, where the major life activity of "working" can refer to the ability to do *one specific job*.

"Medical Conditions." Unique to state law is the specific inclusion of "medical condition" as a protected disability. "Medical condition" is defined, in part, as any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. Unlike the physical disabilities discussed above, a medical condition need not be linked to a limitation in performing a major life activity in order to qualify as disability. In contrast, all impairments must be substantially limiting to merit entitlement under the ADA.

The unique "medical condition" provision of the California law includes genetic characteristics not presently associated with any symptoms of any disease or disorder. It is interesting to note, however, that it is unlawful to subject an applicant or employee to a test for the presence of specific genetic characteristics; therefore, the applicant must inform the prospective employer that he or she carries such a gene, otherwise the employer has no way of knowing that this medical condition exists (since, by definition, it is asymptomatic).

Excluded Conditions. Both state and federal laws specifically exclude certain conditions from protection. These include:

- Sexual behavior disorders, compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs;
- Temporary, nonchronic impairments/conditions of short duration, and with little or no permanent impact (e.g., broken limbs, sprained joints, concussions, influenza, pregnancy);
- Physical characteristics, such as eye and hair color, left-handedness, height, or a predisposition to illness or disease;
- Advanced age (but medical conditions commonly associated with age, such as hearing loss and arthritis, are protected).

Bottom Line: The new FEHA clearly serves to broaden coverage to individuals who would not be deemed as disabled by the ADA. Even prior to the PKP, cases litigated under the FEHA have involved minor and/or temporary conditions, such as myopia, obesity and pregnancy. Therefore, it is safest to assume that candidates found unfit for patrol officer work due to the presence of a physical or medical condition are "disabled," by virtue of the nature of their disqualification.

ESSENTIAL JOB FUNCTIONS

Neither state nor federal law require hiring applicants who, even with reasonable accommodation, cannot perform the essential (vs. marginal) job duties – defined as the fundamental job duties of the position. The designation of essential job functions for a given position is the purview of the employer, not the physician. Legitimate bases for determining essential job functions include:

- employer's judgment
- written job descriptions
- amount of time spent on the job performing the function
- consequences of not requiring the incumbent to perform the function
- collective bargaining agreement
- work experiences of past incumbents
- current work experience of incumbents

Not every function that all employees actually perform constitutes an essential function. The key to determining whether a job duty rises to the level of being "essential" is if the removal of the function would result in a fundamental change in the position itself.[2]

Role of Physician vs. Employer. It is the physician's responsibility to provide guidance on the candidate's *functional limitations* so that the employer can determine whether the candidate is qualified. The doctor must therefore understand the job for which candidate is being considered so that the appropriate functional skills can be evaluated. However, it is the employer (not the physician) who must ultimately decide whether the individual is qualified, and consequently to analyze job functions, identify which functions are essential, and determine whether there is reasonable accommodation available that does not create an undue hardship.

If the doctor's medical screening decisions are based on mistaken assumptions about what the job requires, the doctor's opinion may be discounted by the court. For example, in King v. Yellow Freight System, Inc. (2000), the court found that the employer may have improperly presented inflated physical requirements of a job to several doctors who then determined that an employee couldn't perform the job. In Oswald v. Laroche Chemicals, Inc. (1995), the employer relied in part on the employee's *own* physician's determination that he was not able to perform the job. However, the court questioned whether the functions considered by the doctor were actually necessary for the performance of the job.

Particularly when it comes to public safety position, however, the courts generally (but not always) accept the judgment of the employer in identifying essential job functions. In Martin v. State of Kansas (1999), for example, the court acknowledged the right of

[2] Note: To be able to perform job functions (required or otherwise), an individual must consistently show up for work. Therefore, a candidate whose medical status/history indicates a high likelihood for needing time off beyond what can be reasonably accommodated by the hiring agency could be considered unable to perform the essential job functions by virtue of these excessive absences.

the state penitentiary to broadly define its prison guard positions such that all employees must be able to perform a multitude of individual job assignments (thereby denying the plaintiff's request for permanent watch tower duty). In a similar case (Hoskins v. Oakland County Sheriff's Dept., 2000), a deputy sheriff at a county jail was deemed not qualified for her position due to her inability to restrain inmates, even though deputies are infrequently called upon to physically restrain inmates. In their ruling, the appeals court acknowledged both that controlling inmates is the reason the position exists, and that the consequences of a deputy's failure to successfully restrain inmates could be severe.

The next chapter, "Patrol Officer Job Demands: Their Implication for Medical Screening," provides instructions for identifying essential job functions. It also includes several listings of patrol officer job demands that have relevance to the medical screening of candidates, based on several statewide job analyses performed by POST. They are included to state the assumptions about the essential job functions made during the development of this manual, as well as to assist employers in the development of agency-specific job descriptions

REASONABLE ACCOMODATION

If a candidate with a disability is found unable to perform an essential job function, the next step is not disqualification, but rather consideration of reasonable accommodation options. A reasonable accommodation is defined by the EEOC as "any change or adjustment to a job or work environment that permits a qualified candidate or employee with a disability to participate in the job application process, to perform essential job functions, or to enjoy the benefit and privileges of employment equal to nondisabled employees."

- Many classic forms of reasonable accommodation are not necessarily relevant to the patrol officer position (e.g., wheelchair ramps); however, there are several types of accommodation that are pertinent, including:

- Restructuring a job by reallocating or redistributing marginal job functions;

- Altering when or how an essential function is performed;

- Permitting use of accrued paid leave or unpaid leave for necessary treatment;

- Modifying examinations, training materials or policies (e.g., use of learning aids);

- Acquisition or modification of equipment and devices (e.g., modified car seats or uniforms).

The selection of a reasonable accommodation must be based on a case-by-case assessment of the job, the individual, and the essential job function(s) that the

otherwise qualified individual is unable to safely perform. This assessment involves the employer, the candidate and quite often the screening physician as well.

Under the new FEHA, it is the *employer's* obligation to engage in a timely, good faith, interactive process with the applicant in order to determine effective, appropriate reasonable accommodation options, as well as to make the ultimate selection of the reasonable accommodation that would allow satisfactory performance of the essential job functions.[3] The *individual* must make the employer aware of any "hidden" disabilities (and provide verification upon request). Candidates must also cooperate in the interactive process; they cannot refuse an accommodation merely out of preference; nor can they refuse to acquire additional information as necessary (for example, updated medical records).

The *physician* can also play an integral role in the reasonable accommodation process. As a result of the medical examination, the physician should identify any work restrictions, limitations, or other constraints that must be considered before placing the individual on the job. One of the most common forms of reasonable accommodation of relevance to patrol officer candidates is the use of medications, medical devices and medical monitoring programs. Examples of such regimens and devices include the use of glucose monitoring systems by those with diabetes, the use of anti-epileptic drugs by those with epilepsy, and the use of soft contact lenses or other corrective devices for those with vision impairments. Central to this form of accommodation is the use of pre-placement contracts and monitoring systems to ensure complete and safe compliance with the prescribed regimen.

Undue Hardship. The employer has the ultimate responsibility for determining if the required accommodation is not only "reasonable" (i.e., would actually enable the candidate to perform the job), but also one that would not constitute an "undue hardship." To be considered an undue hardship, an accommodation must be unduly costly, extensive, substantial, or disruptive, or one that would fundamentally alter the nature or operation of a business.

In its Enforcement Guidance on Reasonable Accommodation and Undue Hardship (1999), the EEOC stated that undue hardship may result where an accommodation "would be unduly disruptive to other employees' ability to work." For example, the EEOC stated that if modifying one employee's schedule as an accommodation would so overburden another employee that he would not be able to handle his duties, the employer could show undue hardship. A number of court decisions reflect that an accommodation that would result in other employees having to work harder or longer is not required under the ADA. The employer, however, has the responsibility to base the undue hardship assertion on a strong factual basis, free of speculation or generalization about the nature of the individual's disability or the demands of the particular job.

[3] A Job Accommodation Network (JAN) has been established to assist employers in identifying appropriate reasonable accommodations. The JAN telephone number is (800) 526-7234.

Although the list of reasonable accommodation options is wide-ranging and far-reaching, the courts have generally rejected the argument that the reasonable accommodation requirement extends to creating a new position for the disabled candidate, particularly for law enforcement positions. For example, in Davis v. Meese (1989), the court held that it would create an undue hardship to force the FBI to create a permanent, limited-duty assignment for a special agent with insulin-dependent diabetes. Similarly, in Treadwell v. Alexander (1983) the court agreed that limiting a park technician's patrol duties by shifting those tasks to the limited number of other park technicians gave risk to an undue hardship.

Employers need be forewarned, however, that by arguing that to base a rejection on the excessive costs associated with a reasonable accommodation is to invite an audit of their entire operation's financial resources and practices. Both state and federal law stipulates that the cost that must be spent on an accommodation depends on the employer's resources, not the candidate's salary. Note, however, that employers are not required to pay for personal use items (e.g., eyeglasses), even if needed to perform the job; furthermore, an individual can, if s/he so desires, pay for part of the accommodation that makes it an undue hardship for the employer. State rehabilitation agencies may also be able to supply that part of the funding that constitutes an undue hardship.

THE CONDUCT OF MEDICAL SCREENING EXAMINATIONS

Job Related and Consistent with Business Necessity. Both the ADA and the FEHA require all medical screening examinations to be deferred until after a conditional job offer has been made. Furthermore, all candidates for the same position must receive the same examination (although this does not prevent the conduct of a more in-depth examination of candidates who present medical conditions or symptoms that require evaluation).

The ADA allows screening physicians to conduct any post-offer medical test or make any inquiries as they see fit, without concerns that each procedure is of proven job-relatedness[4]. The medical inquiry provisions of the FEHA, however, severely restrict the employer's right to make health inquiries of applicants. State law requires that all examinations and inquiries be ***job-related* and *consistent with business necessity***.[5]

A question or examination can be justified as job-related and consistent with business necessity if an employer has a reasonable belief, based on objective evidence, that having a particular medical condition would impact the ability to perform essential job functions and/or pose a direct threat. Therefore, general questions such as "Have you ever filed worker's compensation?" are now illegal and must be replaced by questions that target functional impairments that may impact the performance of the essential job functions, such as "Have you ever been injured on the job?"

---

[4] Although , if challenged, decisions based on the examination must be shown to be job-related and consistent with business necessity.

[5] Furthermore, it is unlawful to subject an applicant to a test for the presence of a genetic characteristic.

Individualized Assessment. Blanket rules forbidding employment of all individuals with a particular disability rarely survive legal scrutiny. In virtually all cases, medical screening decisions must be based on an assessment of specific risk posed by the individual, and the specific physical impairment creating the risk. This evaluation cannot be based upon stereotypes, patronizing assumptions or generalized fears about risks that might occur. Nor can it be based on speculation about health insurance or workers compensation costs. Rather, it must be based upon *reasonable, medical judgment* that itself is based upon the most current medical knowledge and/or best available objective evidence. Reasonable medical judgment may include: (1) input from the candidate; (2) experience of the candidate in previous jobs; and (3) documentation from specialists and/or direct knowledge of the candidate. The assessment must also include consideration of reasonable accommodations as a means of eliminating or reducing the risk below the level of direct threat.

Confidentiality. Information from the medical examination must be treated confidentially. Medical examination records must be maintained on forms and in medical files separate from the individual's personnel file. Access to those records must be limited to: (1) selected supervisors and managers who need to arrange necessary restrictions on the work of the employee and make necessary accommodations; (2) first-aid and safety personnel, should emergency treatment be required; and (3) government officials investigating compliance with the FEHA or ADA.

Although they are entitled to access medical records, it is advisable for personnel administrators and other nonmedical individuals involved in the hiring decision to limit this right to only that medical information necessary to determine the whether the candidate is able to perform the essential job functions (and, if necessary, what type of reasonable accommodation is required to allow the candidate to perform these functions). The POST Medical Examination Report (POST 2-253) includes two sections for the screening physician to complete: Examination Results – for physicians to use to record notes made during the examination; and Candidate Assessment – requiring physicians to translate their findings into an assessment of functional limitations as they relate to job performance.

Note, however, that not all medical screening examination findings are protected by these confidentiality provisions. The detection of sociopathological tattoos, or test results that reveal the current use of illegal drugs are two examples of findings that can (and should) be shared with the background investigator, screening psychologist, etc.

Feedback to Rejected Candidates. Candidates must be made aware of the basis for the disqualification decision. In addition, California law requires that, before a final determination is made, the individual must be allowed to submit independent medical opinions for consideration (Cal. Code Reg. Title. 2, 7294.0).

BASES FOR MEDICAL SCREENING DECISION-MAKING

As discussed earlier, employers can lawfully disqualify candidates who are unable to perform the essential job functions, with or without reasonable accommodation. Employers can also disqualify candidates who would cause a real threat to the health and safety of themselves or others (and no reasonable accommodation exists that would eliminate or sufficiently reduce this risk). The ADA refers to this as "direct threat," defined as "a significant risk of substantial harm." The California FEHA provisions (which were not changed by the PKP) distinguishes between a threat to oneself and a threat to others:

> Health/Safety of Self: After reasonable accommodation, individual cannot perform the essential functions of the position in a manner which would not endanger his or her health or safety because the job imposes an *imminent and substantial* degree of risk to the individual; and
>
> Health/Safety of Others: After reasonable accommodation, individual cannot perform the essential functions of the position in a manner which would not endanger the health and safety of others *to a greater extent* than if an individual without a disability performed the job.

Danger to Self v. Others. As the differences between these two risk standards indicates, California courts require a higher level of justification to defend the refusal to hire a candidate because of safety concerns for the individual alone. Labeled "benevolent paternalism," the courts often see employers' "danger to self" disqualifications as based more on concerns about worker's compensation or health care costs than on concerns about the candidate's safety. For example, in a 1983 precedential decision (DFEH v. City of Sacramento), the FEHC used the more rigorous "danger to self" risk standard in ruling that the disqualification of an applicant for auxiliary police officer due to his condition of spondylolysis was discriminatory, finding that the employer based its decision not on the increased risk to others posed by the applicant, but rather on the fact that if the applicant did get hurt, he would be less likely to get well than others. The courts saw this position as another instance of well-meaning paternalism. Similar conclusions were reached by other courts in cases involving an officer with a missing kidney (Pa. State Police v. Pa. Human Rights Comm'n, 1984), and a police officer applicant with a bullet permanently lodged in his rib cage (Baltimore and Ohio, Ry. v. Bowen, 1984).

Under the ADA there is no distinction between "threat to self" and "threat to others." However, be forewarned that decisions based solely on threat to self are on somewhat shaky ground. The threat to self defense is *not* mentioned in the actual ADA itself, but rather was added by the EEOC in their regulations. In fact, a recent 9th Circuit Appeals Court (Echazabal v. Chevron USA, Inc., 2000) ruled that the "threat to self" is not a legitimate defense (although this ruling itself is being appealed).

The risks inherent to the patrol officer position often make the "danger to self" vs. "danger to others" distinction moot. Incapacitation in the midst of a critical incident, while driving, or during a host of other patrol functions could have dire implications for both officers and the public they serve and protect. It is therefore prudent, whenever possible, to ***base safety-based disqualifications on concerns regarding the endangerment of others rather than the candidate himself/herself.***

The risk standard associated with threat to others -- not endangering the health and safety of others *to a greater extent* than if an individual without a disability performed the job -- is actually quite liberal, since individuals with medical conditions will often have an increased risk by virtue of the symptoms and ramifications of the condition itself. For example, virtually all persons with any adult history of a single idiopathic seizure are at some increased risk, depending on the magnitude of the absolute risk. However, this approach would seem contrary to the requirement to conduct individualized assessment. Therefore, simple use of the increased risk criterion may result in judgments against the employer. Furthermore, it may be prudent to accept some increased risk, depending on the magnitude of the absolute risk. For example, as discussed in the Neurology section, a 1/2000 per year risk of seizing while driving patrol car is three times higher than baseline, yet the absolute risk is quite small. On the other hand, a candidate with a risk > 1/100 has both a risk sixty times greater than baseline, and an absolute risk that would likely expose the employer to negligent hire litigation by injured third parties. Therefore, an absolute risk of >1% per year is used in this manual as an informal rule-of-thumb guideline for determining risk to others.

Future Risk. One of the common mistakes made in pre-employment screening is not hiring an individual because a medical condition will make him/her unable to perform the job *in the future*. Both the ADA and FEHA stipulate that employment decisions must be based on the person's ability to *currently* perform the job, not whether the person might be unable to perform the job at some point in the future. State law permits consideration of whether the individual will be able to safely perform over a "reasonable length of time." Determined on an individual basis, it is to include consideration of : (1) the length of the training period relative to the length of time the employee is expected to be employed; (2) the type of time commitment, if any, routinely required of all other employees for the job; and (3) normal workforce turnover.

The ADA makes no such allowances. However, even under federal law it is permissible to base screening decisions on the expectation that the individual will be able to safely perform throughout the training program. Given that the basic academy program requires a minimum of six months to complete, followed by an 18-month field training program, it is reasonable to consider a candidate's ability to safely perform the essential duties of a patrol officer as extending over a 2-year time period.

The physician must keep in mind, however, that the test for deciding whether a candidate poses a direct threat to future health or safety constitutes more than merely determining the likelihood of experiencing symptoms in the future. Rather, the test is whether the individual will create the risk of future *harm*. For example, the fact that an individual with epilepsy might experience a seizure does not necessarily mean that

he/she would present a direct threat. Instead, consideration must be given to the candidate's history of seizure triggered by job-specific stimuli and the likelihood of a random seizure occurring during police duties that could result in major injury to others (as discussed in the Recommended Evaluation Protocol in the "Neurology - History of Seizure" section of this manual).

It is important to note that it is the **employer**, not the **physician**, who has the ultimate responsibility to determine whether a risk is "significant," whether the harm is "substantial," and whether a reasonable accommodation is available. The risks of liability (on both the employer and the M.D.) are much greater when the physician makes a determination that the employer simply follows (Fram, D., 1993).

Considering Prior Workplace Injuries. Using previous workplace injuries as a basis for disqualification should be done carefully. In their 1996 Enforcement Guidance on Workers' Compensation and the ADA, the EEOC has stated that its investigators will consider:

- whether the prior injury(ies) are related to the person's disability (e.g., if employees without disabilities have similar injuries, this may indicate that the injury is not related to the disability)
- the circumstances surrounding the prior injury (e.g., the actions of others in the workplace or the lack of appropriate safety devices or procedures)
- similarities and differences between the position and the candidate's prior position(s) in which the injury(ies) occurred
- whether the current condition of the candidate is similar to his/her condition at the time of the prior injury(ies)
- the number and frequency of prior occupational injury(ies)
- the nature and severity of the prior injury(ies)
- the amount of time the candidate worked in that same or similar position since the injury without subsequent injury
- whether the risk of harm can be lowered or eliminated by reasonable accommodation

Severity v. Likelihood of Risk. The severity of harm *can* be balanced against degree of harm when making direct threat determinations. In EEOC v. Exxon Corp (2000), the court stated that an "acceptable probability of an incident will vary with the potential hazard posed by the particular position . . . the probability of the occurrence is discounted by the magnitude of its consequences." In an ADA case involving HIV-infected prisoners, the court stated that "the potential gravity of the harm . . . imbues certain odds of an event with significance." By way of analogy, the court noted that "we

are far more likely to consider walking a tightrope to pose a significant risk if the rope is 50' high than if it is 1' off the ground. This is so even if the odds of losing our balance are the same however far we have to fall" (Onishea v. Hopper, 1999).

Cases where the courts have actually helped clarify this degree v. likelihood of risk balance are few and far-between. One such instance was Huber v. Howard County, Md. (1995) where the court found that a plaintiff with asthma posed a safety risk in a firefighter job because there was a ten percent chance he would become incapacitated during fires. The court noted that, "given the life and death circumstances facing firefighters, the employer does not have to assume such a 10% risk."

Inherent Risks to Patrol Officers. Although all employers are required to conduct individualized assessment, the courts have generally granted law enforcement agencies wide berth in their employment decisions, basing their decisions on the costly consequences of law enforcement officers being unable to adequately protect the public in emergency situations. For example, in Burroughs v. City of Springfield (1998), the court sided with the hiring agency which rejected a police recruit with diabetes. The recruit had suffered two episodes where he became dysfunctional and disoriented while he was on duty (although no harm occurred during these episodes). The court determine that the recruit posed a direct threat, noting that "the risk of an armed patrol officer being unable to function in an emergency situation is not a risk we are prepared to force a police department to accept. The inherent and substantial risk of serious harm arising from such episodes, given the nature of police work, is self-evident."

Disqualifying candidates who have been successfully performing the same job elsewhere may also raise suspicions. For example, in Holiday v. City of Chattanooga (2000), the City refused to hire a police officer because of his HIV positive status. The court noted, however, that the individual had successfully completed the city's own rigorous physical agility test and had served as a police officer in several other jurisdictions. Note, however, that if the candidate's condition deteriorates, prior satisfactory performance is less persuasive.

If the job that the candidate has been performing can be distinguished from the job at issue, however, past performance will not be especially persuasive. For example, in Huber v. Howard County, Md. (1995), the candidate argued that, despite his asthma, he was qualified for a career firefighter job because he had been performing as a volunteer firefighter. The court disagreed, noting the differences between a career job and a volunteer job. Similarly, in Trevino v. Rock Island Police Dept. (2000), the court deemed the personal experiences of one monocular police officer as nothing more than subjective beliefs and unsupported conjecture, rather than admissible expert testimony to support the claim that another monocular individual could perform the essential functions of a police officer.

SUMMARY

Laws protecting the employment rights of qualified individuals with disabilities have many important implications for the medical screening of patrol officer candidates.

Those aspects of the law with the most direct relevance to medical screening of patrol officers are reiterated below:

1. **Assume that all candidates who are disqualified or deferred on the basis of their medical screening examination results are protected by fair employment laws.** Therefore, these decisions must be shown to be job-related and consistent with business necessity.

2. **Physicians must be provided with a sufficiently detailed description of the position's job demands (essential and marginal) and working conditions that have relevance for medical screening**. Physicians cannot make a valid determination of a candidate's functional work limitations unless they understand the specific physical tasks to be performed and the conditions under which the job is performed. All hiring agencies must ensure that the job information they supply to their physicians is current, accurate, and appropriate for medical screening.

3. **All screening decisions (particularly those that have an adverse impact on the candidate) must be based on an explicit link between the candidate's condition(s) and his/her ability to perform specific job functions**. A summary decision that does not provide this level of detail is not adequate. The physician should identify the specific job duty(ies) or working condition(s) that prohibit a candidate's performance as a patrol officer and/or create an unacceptable risk of injury.

4. **Conduct all medical screening and make all medical inquiries only after a conditional job offer has been made to the candidate; furthermore all examinations and inquiries must be job-related and consistent with business necessity**. Furthermore, although not prohibited by law, it may be prudent to delay the conduct of drug screening tests to avoid inadvertent disclosure of the use of prescription medication.

5. **Treat all medical information confidentially**. Maintain these records separately; limit the individuals who have access.

6. **Evaluate each candidate on a case-by-case basis; do not make blanket rules excluding all candidates with specific disabilities**. Examine each situation based on the particular facts of the individual and the job.

7. **Physicians and hiring authorities must use the correct risk evaluation criteria in making their screening recommendations and decisions, respectively**. Evidence associated with the immediacy, severity, and likelihood of the risk must all support any decisions of disqualification due to the direct threat posed by the candidate. Concerns regarding a candidate's risk to others takes precedence over the risk to self in this assessment.

8. **Medical decisions should be supported by generally accepted medical evidence**. Screening physicians must understand that their personal opinion is less important than a generally accepted medical opinion. However, general medical evidence must also be appropriately applied to the specifics of the individual's condition.

9. **Consider reasonable accommodations**. Before denying a candidate a job because of his/her inability to perform the essential functions of the job or due to a direct threat risk, the physician and the employer must consider accommodations that could eliminate or reduce this risk.

REFERENCES

Albertsons', Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999).

Antonsen v. Ward, 190 A.D.2d 606, 594 N.Y.S.2d 994 (1993).

Baltimore and Ohio Railway Company v. Bowen, 60 Md.App. 299, 482 A.2d 921 (1984).

Burroughs v. City of Springfield, 163 F. Supp. 898 (E. D. Pa.1997).

California Code of Regulations (2001), Division 4, Title 2, Chapter 1, Subchapter 9, § 7293.8(f).

California Commission on Peace Officer Standards and Training (P.O.S.T.) (2001), Regulation 1002 (a)(7), P.O.S.T. Administrative Manual, Sacramento.

California Commission on Peace Officer Standards and Training (P.O.S.T.) (2001), Commission Procedure C-2, P.O.S.T. Administrative Manual, Sacramento.

DFEH v. City of Sacramento, FEHC Dec. No. 83-20 (1983).

California Fair Employment and Housing Act (FEHA) [California Government Code § 12900 et. seq.].

California Government Code (2001), Division 3, Part 2.8, Chapter 4, Definitions, § 12926(n)(1)(2).

California Government Code (2001), Division 4, Chapter 1, Article 2, Disqualifications for Office of Employment, § 1031(f).

California Prudence Kay Poppink (PKP) Act, January 1, 2001 [Stats. 2000, Ch. 1049].

Cripe v. City of San Jose, 261 F.3d 877 (2001).

Davis v. Meese, 865 F.2d 592 (1989).

Echazabal v. Chevron USA, Inc., U.S. App. (9th Cir.), Lexis 11399, (2000).

EEOC v. Exxon Corporation, U. S. Court of Appeals, 5th Cir., No. 98-11356, § 4.05 [3], (2000).

Fram, D. K. 1993. Examining the relationship between employers and health professionals under the ADA. Health Professionals. May, 307 - 312.

Holiday v. City of Chattanooga, 206 F. 3d 637 (6th Cir.) (2000).

Hoskins v. Oakland County Sheriff's Department, United States Court of Appeals, 6th Cir., No. 99-1491, July 31, 2000.

Huber v. Howard County, Md., 849 F. Supp. 407, 3AD Cases 262 (D. Md. 1994), aff'd, 56F.3d 61, 4 AD Cases 864 (4th Cir.), cert. denied, 516 U.S. 916 (1995).

Martin v. Kansas, 190 F. 3d 1120 (10th Cir.), (1999).

Murphy v. United Parcel Service, Inc., 527 U.S. 516 [119 S. Ct. 2133 (1999)].

Onishea v. Hopper, U. S., 11th cir., 171 F.3d 1289 (1999).

Pennsylvania State Police v. Pennsylvania Human Rights Commission, 427 U.S. 516 (1984).

Sutton v. United Airlines, Inc., 527 U.S. 471, 475, [119 S. Ct. 2139 (1999)].

Treadwell v. Alexander, 707 F.2d 473 (1983).

Trevino v. Rock Island Police Department, U.S. District Court, Central District of Illinois, Rock Island Division, No. 98-4092, February 15, 2000.

United States Americans with Disabilities Act (ADA), [42 U.S.C. § 1201 et. seq.].

United States Equal Employment Opportunity Commission, (1996), Enforcement Guidance: Workers; Compensation and the ADA. September, Washington DC.

United States Equal Employment Opportunity Commission, (1999) Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disability Act, March, Washington DC.